Filed 8/7/12 In re Brandon G. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re BRANDON G., a Person Coming Under the Juvenile Court Law.	B234464
THE PEOPLE, Plaintiff and Respondent, v. BRANDON G., Defendant and Appellant.	(Los Angeles County Super. Ct. No. NJ26231)

APPEAL from an order of the Superior Court of Los Angeles County. John C. Lawson II, Judge. Affirmed.

Laini Millar Melnick, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Brandon G. (the minor) appeals from the order sustaining a Welfare and Institutions Code section 602 petition alleging he illegally possessed a firearm (former Pen. Code, § 12101, subd. (a)(1))[1] and committed an assault with a firearm upon Star J. (§ 245, subd. (a)(2)). He contends (1) the order sustaining is not supported by sufficient evidence; (2) he was denied his state and federal constitutional rights to confrontation and cross-examination as a result of certain sustained objections; and (3) declaring the gun possession crime a "felony" was error. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The events in question took place on May 28, 2011. At the time, the minor was 14 years old. He had previously been harassing 14-year-old Star J. who had quarreled with his sister over a boy. Star was walking home alone on Pine Avenue in Long Beach at about 8:40 p.m. when the minor walked out of a gate and confronted Star. In the dark, Star could make out two boys standing behind the minor, but she could not see them well.[2] Standing about five feet away from Star, the minor pulled out a black gun, pointed it at Star's head and said, "Where is he? Where is your bitch ass brother and your boyfriend?" Frightened, Star ran the several blocks to her home. Star arrived home at about 9:00 p.m. and told her mother what had happened. Her mother called 911. Star knew that the gun the minor pointed at her was real because she had once seen a real gun lying in the street.

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[1] All undesignated statutory references are to the Penal Code. Effective January 1, 2012, former section 12101, subdivision (a)(1) ("A minor shall not possess a pistol, revolver, or other firearm capable of being concealed upon the person") was repealed and replaced with section 29610 (same). (Stats. 2010, ch. 711, § 4 et seq.) All references to section 12101 are to the statute in effect on May 28, 2011, when the charged offenses occurred.

[2] The minor makes much of Star's testimony that she was not wearing her prescription glasses. But there was no evidence of whether Star was nearsighted, farsighted or had an astigmatism. Without this information, the fact that she was not wearing glasses at the time of the incident has little relevance.

The minor was detained the next day, after Star identified him from a "six-pack" photographic lineup. The minor denied having a gun and pointing it at Star. He claimed he had been at a friend's home when the assault allegedly occurred. No gun was found.

The house of minor's friend who provided minor with his alibi was four or five blocks from where the assault occurred. The friend's parents confirmed that the minor was there that night. The father stated that the minor and another boy were there when the father arrived home at about 7:00 p.m. For the next few hours, the three boys were in the son's room with the door closed. The father saw the boys at about 8:30 p.m. when he told them to turn down the music. He next saw the minor at about 9:30 p.m. when the minor and the other boy were leaving.

The trial court sustained the petition, finding the allegations that the minor assaulted Star with a firearm and illegally possessed a firearm to be true beyond a reasonable doubt; it found the illegal possession of a firearm offense to be a felony. The minor was committed to the Camp-Community Placement Program for a maximum confinement period of four years for the assault; imposition of a commitment term for the illegal possession of a firearm was stayed pursuant to section 654.

The minor timely appealed.

DISCUSSION

A. Sufficiency of the Evidence

The minor contends the evidence was insufficient to establish (1) that the object Brandon pointed at Star was a real gun and (2) that the gun was loaded. He argues that neither Star's testimony nor the circumstances of the crime constitutes substantial evidence of these elements. We disagree.

1. Standard of Review

We apply the same standard of review to a challenge to the sufficiency of the evidence to support the sustaining of a section 602 petition as we apply to a sufficiency of

the evidence challenge to a criminal conviction. (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371.) We review the whole record to determine whether the verdict is supported by substantial evidence—"i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . [W]e review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]' . . . A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).)

"The same standard governs in cases where the prosecution relies primarily on circumstantial evidence. We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence.' 'Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt.' Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*Zamudio, supra,* 43 Cal.4th at pp. 357-358, citations omitted.)

2. Substantial Evidence That the Object Was a Real Gun

A requisite element of both assault with a firearm (§ 245, subd. (a)(2)) and illegal possession of a firearm by a minor (§ 12101, subd. (a)(1)) is that the object was a firearm

as defined in former section 12001, subdivision (a).[3] (§ 12001, subd. (a)(1) [defining firearm as used in title 2, "Control of Deadly Weapons," which includes § 12101]; *In re Jose A.* (1992) 5 Cal.App.4th 697, 700 [definition of firearm in § 12001 applies to assault with a firearm].) At the time of the offenses, former section 12001, subdivision (a)(1) defined a firearm for purposes of both offenses as "any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion or other form of combustion . . . ."

Because victims generally lack the expertise to tell whether an object is a firearm or a toy, circumstantial evidence alone is sufficient to support a finding that the object was a firearm. Thus, when the perpetrator displays an object that looks like a gun, the object's appearance and the perpetrator's conduct and words in using it may constitute sufficient evidence to support a finding that it was a firearm as defined in section 12001, subdivision (b). (*People v. Law* (2011) 195 Cal.App.4th 976, 983.) "Testimony by witnesses who state that they saw what looked like a gun, even if they cannot identify the type or caliber, will suffice" to prove "the gun was not a toy." (*People v. Aranda* (1965) 63 Cal.2d 518, 532-533 (*Aranda*), partially abrogated by constitutional amendment on another point.) In *People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1437, the court observed: "As the old saying goes, 'if it looks like a duck, and quacks like a duck, it's a duck.' The pistol tucked into defendant's waistband looked like a firearm, and it in effect communicated that it was a firearm when defendant menacingly displayed it and ordered the victim to give him her purse. While it is conceivable that the pistol was a toy, the jury was entitled to take defendant at his word, so to speak, and infer from his conduct that the pistol was a real, loaded firearm . . . ."

Here, Star's testimony that the object the minor pointed at her looked like a real gun, her proximity to the gun, and the minor's conduct of pointing the weapon at Star in a

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[3] Former section 12001 was repealed effective January 1, 2012. (Stats. 2010, ch. 711, § 4.) The general definition of firearm is now found in section 16520, subdivision (a), and it is identical to the definition in the former statute. All references to section 12001 are to the former statute in effect on May 28, 2011.

threatening manner, constituted substantial evidence that the gun was real. That Star had little familiarity with firearms and that the police did not recover the gun does not compel a contrary result.

3. Substantial Evidence That the Gun Was Loaded

Pointing a loaded gun at someone in a menacing manner is sufficient to establish the requisite mental state for assault with a firearm. (*People v. Hartsch* (2010) 49 Cal.4th 472, 507-508; *People v. Raviart* (2001) 93 Cal.App.4th 258, 263-264.) But pointing an *unloaded* gun in a threatening manner is not sufficient. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 (*Rodriguez*).)[4]

As we have explained in our discussion about proof that the gun was real, whether the gun was loaded may be established by circumstantial evidence: "[A] defendant's statements and behavior, while making an armed threat against a victim, may warrant a jury's finding the weapon was loaded." (*Rodriguez*, *supra*, 20 Cal.4th at p. 12.) *Lochtefeld, supra*, 77 Cal.App.4th 533, is instructive. In that case, the issue was whether the pellet gun the defendant used was operable and, therefore, a deadly or dangerous weapon. The court held that the defendant's "acts in threatening persons on the street and in pointing the gun at officers demonstrated his implied assertion the gun was sufficiently charged to inflict injury." (*Id*. at p. 542.)

Here, by pointing the gun at Star's head and saying, "Where is he? Where is your bitch ass brother and your boyfriend?" the minor in effect communicated that it was a loaded firearm. While it is theoretically possible that the gun was not loaded, the juvenile court was entitled to infer otherwise based on the minor's conduct.

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[4] The *Rodriguez* court declined to address the continued validity of this rule, which the court in *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 542, fn. 10 (*Lochtefeld*), called an "anachronism" and urged the Supreme Court to reexamine and discard. To date, our Supreme Court has not acted on the invitation.

B. The Minor Was Not Denied His Right to Confront and Cross-examine Star

The minor contends the trial court violated his state and federal constitutional rights to confrontation and cross-examination by limiting his cross-examination of Star on the issue of how she knew the gun was real. We disagree.

Star testified that she could not describe the gun the minor pointed at her but she knew it was real. During the minor's cross-examination of Star, there was this colloquy: "[DEFENSE COUNSEL]: Have you ever seen a real gun? [¶] [STAR]: Yes. [¶] [DEFENSE COUNSEL]: When? [¶] [STAR]: I seen one laying on the street before. [¶] [DEFENSE COUNSEL]: When? [¶] [STAR]: I don't remember. [¶] [DEFENSE COUNSEL]: You don't remember when? [¶] [STAR]: No. [¶] [DEFENSE COUNSEL]: What street was the gun laying on? [¶] [STAR]: It was on Chestnut. [¶] [DEFENSE COUNSEL]: On Chestnut? What's the cross street with Chestnut where it was laying? [¶] [STAR]: Chestnut and 19th. [¶] [DEFENSE COUNSEL]: So you saw a gun laying on Chestnut and 19th? [¶] [STAR]: Yes. [¶] [DEFENSE COUNSEL]: How long ago? [¶] [STAR]: I don't remember. [¶] [DEFENSE COUNSEL]: How do you know that gun was real? [¶] [STAR]: Because I know what a real gun is. [¶] [DEFENSE COUNSEL]: So you know what a real gun is? [¶] [STAR]: Yes, sir. [¶] [DEFENSE COUNSEL]: How do you know what a real gun is? [¶] [THE PROSECUTOR]: Objection, Your Honor, asked and answered. [¶] THE COURT: Sustained. [¶] [DEFENSE COUNSEL]: How do you know the gun on Chestnut Street you saw was real? [¶] [THE PROSECUTOR]: Objection, Your Honor, asked and answered. [¶] THE COURT: Sustained."

The right to confrontation and cross-examination is an essential and fundamental requirement of a fair trial. (*People v. Brown* (2003) 31 Cal.4th 518, 538.) But the right is not absolute. (*Ibid*. at p. 538, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 295.) Courts have statutory authority to "exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue

harassment or embarrassment." (Evid. Code, § 765, subd. (a).) The objection "asked and answered" is founded on that statute. (*People v. Lewis* (2006) 39 Cal.4th 970, 1025.)

Here, that the minor pointed a real, loaded gun at Star was supported by the minor's own words and conduct as well as Star's testimony that the gun was real. How Star knew the gun was real was not particularly relevant since a victim's testimony that they saw what looked like a gun is sufficient, even if the victim is not familiar with guns. (*Aranda, supra*, 63 Cal.2d at pp. 532-533.) Under these circumstances, it was not an abuse of discretion for the trial court to conclude the factfinding process was not furthered by questions about Star's familiarity with guns that were similar, if not identical, to earlier-answered questions.

C. The Trial Court Did Not Err in Declaring the Violation of Penal Code Section 12101, Subdivision (a)(1) to Be a Felony

The minor contends it was error for the trial court to declare the possession of a firearm offense to be a felony. He argues that the offense can only be declared a felony if the minor was found *guilty* of violating Penal Code section 12101, subdivision (a)(1), but a minor in delinquency court cannot be found *guilty* of a crime because an order adjudging a minor a ward of the court is not deemed a criminal conviction. (Welf. & Inst. Code, § 203.) The minor is incorrect.

Subdivision (c) sets forth the punishment for violation of section 12101. Under subdivision (c)(1)(C), a minor "shall be punished" by imprisonment in the state prison or in a county jail if the minor "has been found *guilty*" of a violation of section 12101, subdivision (a)(1). (Italics added.)

To sustain a Welfare and Institutions Code section 602 petition, the juvenile court must make a finding that the minor violated a law that defines a crime. (Welf. & Inst. Code, § 602, subd. (a).) The allegations of a delinquency petition are subject to the same "beyond a reasonable doubt" standard of proof that is applied in a criminal court. (*In re Winship* (1970) 397 U.S. 358, 368.) If the crime would be punishable as a felony or a misdemeanor if committed by an adult, the juvenile court must declare whether it was a

misdemeanor or felony as committed by the minor. (Welf. & Inst. Code, § 702.) Our Supreme Court has held that a minor's admission to the allegations of a petition "is the equivalent plea of guilty. . . ." (*In re Patterson* (1963) 58 Cal.2d 848, 853.) By analogy, a finding that the allegation of the petition are true is the equivalent of a guilty finding for these purposes.

In re Jose T. (1997) 58 Cal.App.4th 1218 (*Jose T.*) is on point. In that case, the trial court sustained a juvenile court petition and committed the minor to the Youth Authority for violation of section 12101, subdivision (a)(1). The appellate court affirmed, explaining that the minor was " 'found guilty of a violation of paragraph (1) of subdivision (a),' and thus is subject to a felony disposition at the discretion of the trial court." (*Jose T.*, at p. 1221.) The appellate court treated the sustained petition as the equivalent of a guilty finding for purposes of determining the appropriate punishment under section 12101, subdivision (c). Also instructive is *In re Jovan B.* (1993) 6 Cal.4th 801, 813 (*Jovan B.*), in which our Supreme Court held that an enhancement for commission of a felony while released on bail or own recognizance (former § 12022.1), applied to juveniles notwithstanding use of the term "conviction" in the enhancement statute.

Under the reasoning of *Jovan B.* and *Jose T.*, we conclude that a sustained petition is the equivalent of a finding of guilt within the meaning of section 12101, subdivision (a) and (c). Accordingly, the trial court did not err in declaring the offense a felony.

DISPOSITION

The order is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J. GRIMES, J.